STATE OF MICHIGAN

COURT OF APPEALS

DAIMLERCHRYSLER CORPORATION,

Plaintiff-Appellee,

v

HUGH P. CARSON,

Defendant-Appellant.

UNPUBLISHED
March 6, 2003

No. 237315
Oakland Circuit Court
LC No. 00-021362-CZ

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a trial court order vacating an arbitration award in his favor. We reverse and remand for further proceedings consistent with this opinion.

The arbitrator found that plaintiff breached the parties' otherwise at-will employment agreement by failing to conduct a "fair and thorough investigation" of a supplier's allegations against defendant before terminating his employment. The arbitrator awarded defendant $1,221,214 in damages: (i) $450,000 in back pay from March 7, 1997 (defendant's discharge date) through June 30, 2001 (the date of the arbitration award), and (ii) $915,214 in front pay through age sixty-seven, less $144,000 representing defendant's future earning capacity. As noted above, the trial court vacated the arbitration award.

On appeal, defendant contends that the trial court erred in vacating the arbitration award. We review de novo a trial court's decision to enforce, vacate or modify an arbitration award. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991).

Generally, "only those awards that contain an error of law discernible on the face of the very award itself are reviewable." *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001). "'[I]t is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable.'" *Id.*, quoting *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). In other words, the arbitrator must have "displayed a manifest disregard of the applicable law." *Krist, supra* at 67, quoting *Gavin, supra* at 443.

Here, the arbitrator ruled that defendant was an at-will employee, but that, essentially, plaintiff could not terminate him based on a supplier's allegations, unless plaintiff first conducted a fair and thorough investigation. In vacating the arbitration award, the trial court opined that the

arbitrator's "application of the law with respect to at-will employment" conflicted with controlling principles of law.

However, it is a "fundamental proposition that parties to an employment contract are free to bind themselves to whatever termination provisions they wish." *Thomas v John Deere Corp*, 205 Mich App 91, 93-94; 517 NW2d 265 (1994). In *Thomas*, we emphasized that an employment contract can fall in between the extremes of at-will and just-cause employment:

> Consequently, it is somewhat misleading to talk about employment contracts as being either "at-will" or just-cause." In some employment contracts, employers choose to retain unfettered discretion to terminate an employee's employment when doing so would not violate the law. In other employment contracts, employers agree to limit their discretion to terminate an employee's employment in some way. Employers and employees are free to bind themselves as they wish, and "at-will" and "just-cause" termination provisions are merely extremes that lie on opposite ends of the continuum of possibilities. [*Id.* at 94.]

Accordingly, we conclude that, based on *Thomas*, an employer can partially limit its "at-will" authority without necessarily creating a just-cause employment relationship. Thus, the arbitrator's conclusion that plaintiff agreed to limit its discretion in terminating defendant's employment (by entitling him to a fair and thorough investigation before discharging him based on a supplier's allegations) without creating a just cause relationship did not contravene controlling legal principles. Moreover, the arbitrator's conclusion falls well short of being facially erroneous.[1] See *Krist, supra* at 67. As such, we agree with defendant's contention that the trial court erred in ruling that the arbitration award was in contravention of controlling legal principles.

Plaintiff contends, alternatively, that the arbitrator's award also contravened controlling principles of law because the statements regarding defendant's entitlement to a "fair and thorough investigation" were legally insufficient to create an enforceable employment contract under a "legitimate expectations" theory. In *Rood v General Dynamics Corp*, 444 Mich 107, 138-139; 507 NW2d 591 (1993), our Supreme Court explained that there are two steps in analyzing a legitimate expectations claim. First, it must be determined "what, if anything, the employer has promised."[2] *Id.* at 138. Second, if a promise has been made, it must be determined

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[1] Additionally, we note that the arbitration agreement contemplated that there would be situations where, as here, the at-will policy was supplemented by "the terms of an alleged employment agreement . . . ." Thus, the arbitrator's ruling is not contrary to the four corners of the arbitration agreement.

[2] The *Rood* Court noted that promises may be either express or implied. *Rood, supra* at 138. The Court recognized that a "promise" is essentially "'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *Id.* at 138-139, quoting Restatement Contracts, 2d, § 2(1). The Court recognized, of course, that not every policy statement will rise to the level of a promise. *Rood, supra* at 139. For example, the Court cautioned that "an employer's policy to act or refrain from acting in a specified way if the employer chooses is not a promise at all." *Id.* Finally, the Court noted that the "more indefinite the terms, the less likely it is that a promise has been

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"whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees."[3] *Id.* at 139.

The *Rood* Court further held that "the trial court should examine employer policy statements, concerning employee discharge, if any, to determine, as a threshold matter, whether such policies are reasonably capable of being interpreted as promises of just-cause employment." *Rood, supra* at 140. If the trial court concludes that the employer's policies are "incapable of such interpretation," then the court "should dismiss the plaintiff's complaint on defendant's motion for summary disposition." *Id.* On the other hand, if "the employer's policies relating to employee discharge are capable of two reasonable interpretations, the issue is for the jury." *Id.* at 140-141. Accordingly, it appears that plaintiff's contention is not merely a challenge to the arbitrator's factual findings, but falls within the scope of legal error.

Here, there were facts suggesting that Lutz told defendant, and similarly situated employees, that plaintiff would conduct a "fair and thorough investigation" in response to potential supplier complaints. The statement was made during a meeting where plaintiff, through Lutz, instructed its employees to elevate their diligence in reviewing the suppliers' performances. In fact, this statement was made in response to a specific employee question; in other words, one of the employees speculated that a supplier might make retaliatory accusations. Implicit in this statement was plaintiff's assurance that disciplinary action would not be taken based solely on a supplier's accusations.

Again, in determining whether the statement rose to the level of a promise, we must analyze whether the statement was sufficiently specific. *Rood, supra* at 138-139. Here, plaintiff stated that it would respond to supplier complaints by conducting a "fair and thorough investigation." We note that this is more specific than a promise to merely treat employees fairly. See *id.* at 141 ("A promise of fairness, without more, is too vague to judicially enforce."). Indeed, it is more readily discernible whether a fair and thorough investigation has taken place, than it is to determine whether general "fairness" has been achieved. Accordingly, we believe that the statement was sufficiently specific to allow reasonable minds to differ as to whether there was a promise.[4]

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made." *Id.*

[3]As noted above, the concepts "at-will" and "just-cause" termination provisions are merely the extremes that on opposite ends of the continuum. *Thomas, supra* at 94. If courts are willing to recognize "hybrid" termination provisions, it necessarily follows that employers would have to be able to take certain actions to create those provisions. Similarly, it is within reason for an employee to recognize and legitimately expect that the employer would comply with its provisions—regardless of where those provisions fall in the termination continuum. Thus, although defendant is not contending that the purported promise elevated his employment status to "just-cause," we do not believe that his claim should fail merely for trying to establish a lesser legitimate expectation.

[4] It should also be noted that the statement was not conditional. In other words, plaintiff did not expressly retain discretion as to whether to conduct a "fair and thorough investigation" upon receiving a complaint. See *Rood, supra* at 139.

As noted above, we must also determine whether reasonable minds could differ in finding that the promise was reasonably capable of instilling a legitimate expectation of a "fair and thorough investigation" in response to supplier complaints. *Rood, supra* at 139. Again, the facts suggest that the statement was made in response to a specific question about potential supplier complaints. The statement was designed to assuage employee concern about retaliatory complaints. The apparent purpose of the statement was to convince the employees to believe that it was a true statement, as necessary to motivate them to be more demanding of suppliers. The fact that a statement was made to encourage action on the part of the recipient supports a finding that the recipient was reasonable in legitimately expecting the statement to be a promise.

In addition, it should be noted that the statement itself bears indicia of reasonableness. The statement was not a willingness to blindly support the employees in the face of all accusations. Rather, the statement was an implied assurance that disciplinary action would not occur based solely on a supplier's accusations. The statement does not make promises that run afoul of sound business practice, nor it is beyond reason that this promise would supplement an at-will policy of employment. Accordingly, we conclude that the promise was sufficient to be reasonably capable of instilling a legitimate expectation of a "fair and thorough investigation" in response to supplier complaints. *Rood, supra* at 139.

Thus, we believe that the facts of the instant matter are capable of different interpretations; therefore, the facts were sufficient to merit submission to a trier of fact. *Rood, supra* at 140-141. As a result, we reject plaintiff's contention of error.[5]

Plaintiff also argues on appeal, as an alternative ground for affirming the trial court's ruling, that the arbitrator exceeded the scope of his authority. Indeed, one ground for vacating a statutory arbitration is if the arbitrator exceeded his granted powers. MCR 3.602(J)(1); *Gavin, supra* at 434.[6] To determine whether an arbitrator exceeded his or her scope of authority, we examine whether the arbitrator rendered an award that comports with the material terms of the arbitration agreement. *Id.*; *Dohanyos v Detrex Corp (After Remand),* 217 Mich App 171, 176-177; 550 NW2d 608 (1996).

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[5] We cannot review an arbitration award "on the basis that the award was against the great weight of the evidence or that it was not supported by substantial evidence." *Donegan v Mich Mutual Ins Co,* 151 Mich App 540, 549; 391 NW2d 403 (1986). This is not to say that we would necessarily have made the same factual findings as the arbitrator. Instead, our conclusion merely reflects that we do not believe that the arbitrator's decision was legally erroneous.

[6] "The Michigan arbitration statute [MCL 600.5001(2)] provides that an agreement to settle a controversy by arbitration under the statute is valid, enforceable, and irrevocable if the agreement provides that a circuit court can render judgment on the arbitration award." *Hetrick v Frideman,* 237 Mich App 264, 268; 602 NW2d 603 (1999), quoting *Tellkamp v Wolverine Mut Ins Co,* 219 Mich App 231, 237; 556 NW2d 504 (1996) (emphasis deleted). The arbitration agreement in this case provides: "The Arbitrator's award will be enforceable in a federal district court or state court." Furthermore, the agreement provides for limited judicial review in state court or federal court "in accordance with the legal standards for review of arbitration awards." Therefore, the arbitration in this case constitutes statutory arbitration. *Collins v Blue Cross Blue Shield of Michigan,* 228 Mich App 560, 566-567; 579 NW2d 435 (1998).

Here, the terms of the arbitration agreement limited the arbitrator's authority in several respects. First, the arbitrator possessed, by the terms of the agreement, a limited authority to determine whether defendant's discharge was lawful and consistent with plaintiff's at-will employment policy. When the agreement is read in its entirety,[7] it is evident that the agreement clearly contemplated that the arbitrator could determine whether an employment contract or agreement existed, and whether plaintiff breached its terms.

Second, the arbitration agreement limited the arbitrator's authority by (i) requiring the arbitrator to interpret and apply plaintiff's policies and (ii) prohibiting the arbitrator from adding to or modifying plaintiff's policies or procedures. Plaintiff contends that the arbitrator was required to apply plaintiff's stated at-will policy, and could not alter that policy by creating an investigative prerequisite. However, the arbitrator did not alter plaintiff's at-will policy. Rather, the arbitrator found that plaintiff has altered its policy when Lutz made his statements to certain employees. Thus, the arbitrator merely interpreted an existing policy, a task clearly within the arbitrator's granted scope of authority. Consequently, we reject plaintiff's alternative argument and conclude that the trial court erred in vacating the arbitration award. *Gordon Sel-Way, supra* at 496-497.

Next, the parties dispute the propriety of the arbitrator's remedial award. An arbitrator's remedial authority is limited to the contractual agreement of the parties. *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 355; 511 NW2d 724 (1994). The arbitration agreement at issue limited the arbitrator's authority to award relief to that which a court could grant. In addition, the arbitration agreement prevented the arbitrator from awarding pay in lieu of future earnings. Plaintiff contends that, under controlling principles of Michigan law, the arbitrator could award only nominal damages for the breach of an at-will employment contract. Therefore, plaintiff contends that the arbitrator was precluded from awarding both back pay and front pay. We agree in part.

Generally, "in a breach of contract claim the injured party may recover those damages which are a direct, natural and proximate result of the breach." *Ritchie v Michigan Consolidated Gas Co*, 163 Mich App 358, 374; 413 NW2d 796 (1987). However, in *Franzel v Kerr Manufacturing Co,* 234 Mich App 600, 606; 600 NW2d 66 (1999), we recognized that an employee's damages for breach of an at-will employee agreement are limited to merely nominal damages.

However, we note that, in *Franzel*, once the employee returned to work, she had no expectation of continued employment because she remained an at-will employee. See *Franzel, supra* at 613. In contrast, in this case, defendant had an expectation of continued employment until plaintiff conducted a fair and thorough investigation. As discussed above, the arbitrator found that defendant remained an at-will employee, with the exception that plaintiff had a duty to thoroughly investigate any supplier-initiated charges before taking any employment action. Once plaintiff completed the investigation, defendant could be terminated for any reason pursuant to his at-will employment status. Therefore, for the period from defendant's date of

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[7] A contract must be construed in its entirety. *Perry v Sied,* 461 Mich 680, 689; 611 NW2d 516 (2000).

termination until his reinstatement, he fell under the limited exception to the at-will policy because plaintiff had not conducted a thorough and fair investigation as promised. Accordingly, during that time frame, defendant had an expectation of continued employment and *Franzel* would not limit defendant's entitlement to back pay and reinstatement as initially awarded by the arbitrator.

However, once plaintiff completed a proper investigation, defendant would no longer fall under the limited exception to his at-will employment status recognized by the arbitrator, and plaintiff could terminate his employment at will or "at any time." Thus, after plaintiff fulfilled its contractual obligation to conduct a fair and thorough investigation, defendant no longer had an expectation of continued employment. Therefore, an award of front-pay damages, other than nominal damages, would be inappropriate under controlling principles of law.

Further, we find that the arbitrator exceeded his limited scope of authority, pursuant to the agreement, by awarding front pay. Pursuant to the express terms of the arbitration agreement, the arbitrator could not award pay in lieu of future earnings. Therefore, in accordance with the agreement, the arbitrator could not initially award front pay. Second, the arbitrator, pursuant to the agreement, could not award front pay as an element of "damages in lieu of reinstatement." Consequently, to the extent that the trial court vacated the award of front pay, we affirm that ruling.

Reversed and remanded for confirmation of the arbitration award (excluding the award for front pay). We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ William C. Whitbeck, C.J.
/s/ Donald S. Owens